A

KEE HIN VENTURES SDN BHD
v. GREAT PARTNERS INDUSTRIES LTD & ORS

COURT OF APPEAL, PUTRAJAYA
RAVINTHRAN PARAMAGURU JCA
MARIANA YAHYA JCA
B LIM CHONG FONG JCA
[CIVIL APPEAL NO: W-02(NCC)(W)-646-04-2022]
31 MAY 2024

C **Abstract** – *(i) An arbitration award, which involves only the shareholders of a company, does not bind the company itself as the company is a separate legal entity that could not be bound by proceedings to which it is not made a party; (ii) The court's power to award pre-judgment interest, pursuant to s. 11 of the Civil Law Act 1956, is subject to contractual provisions. When a contract expressly deals with the issue of interest, the court's discretion to award interest shall then be limited to the terms of the contract; (iii) Clear and unequivocal written admission of debt may prevent the operation of the limitation period. The limitation period for a claim of debt restarts if a debtor acknowledges such debt in writing.*

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E

ARBITRATION: *Award – Company matter – Dispute in relation to payment of dividends – Claim involving shareholders of company – Arbitral tribunal allowed minority shareholders' claim for outstanding dividends owed – Arbitral award enforced as judgment of court – Whether arbitral award binding on company – Whether company party to arbitration – Whether company separate legal entity*

F

CIVIL PROCEDURE: *Interest – Award – Dispute in relation to payment of dividends – Claim involving shareholders of company – Arbitral tribunal allowed minority shareholders' claim for outstanding dividends owed – Arbitral award enforced as judgment of court – High Court ordered company to pay interest on dividends on basis that interest was awarded in arbitral award – Whether arbitral award binding on company – Whether High Court could exercise discretion to award pre-judgment interest pursuant to s. 11 of Civil Law Act 1956*

G

COMPANY LAW: *Oppression – Petition – Dispute in relation to payment of dividends – Matter referred to arbitration – Claim involving shareholders of company – Arbitral tribunal allowed minority shareholders' claim for outstanding dividends owed – Arbitral award enforced as judgment of court – Whether arbitral award binding on company – Whether company party to arbitration – Whether company separate legal entity*

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I

The appellant was a private limited investment holding company while the respondents were its minority shareholders. The majority shareholders and directors of the appellant were Cheng Ping Keat ('CPK') and Cheng King Fa ('CKF'). The respondents had commenced an oppression petition against the majority shareholders and others, pursuant to s. 181 of the Companies Act 1965, following disputes in relation to the payment of dividends by the appellant. The petition was stayed, and the disputes were instead referred to arbitration. The arbitral tribunal dismissed the majority shareholders' claim but allowed the respondents' counterclaim for outstanding dividends owed ('award'). The award was later enforced as a judgment of the court. The majority shareholders applied to set aside the said enforcement order, but the application was dismissed. Consequently, the respondent commenced a suit against the appellant, at the High Court, for the recovery of dividends (i) declared by the appellant for the years 2013 to 2016, amounting to RM3,605,857.57 ('first head of claim'); and (ii) undeclared by the appellant for the years 2008 to 2012 and 2017, amounting to RM5,490,238.53. The High Court allowed the respondents' first head of claim and dismissed the second head of claim. Hence, the present appeal. The issues that arose for adjudication were: (i) whether the appellant was bound by the effect of the award in respect of the interest awarded. On this issue, the appellant submitted that the Judicial Commissioner ('JC') wrongly ordered the payment of interest on the dividends declared between 2013 to 2016, amounting to RM3,605,856.57, on the basis that interest was awarded in the award; and (ii) whether limitation had set in *vis-à-vis* the appellant's letter dated 31 March 2017 ('letter'). On this issue, the appellant submitted that the last day for the respondents to initiate their claim for the dividends was on 3 October 2019, based on the date of declaration of dividends as evidenced in the appellant's audited financial statements for the financial year 2023, but the respondents only brought their action on 8 November 2019.

Held (allowing appeal in part; varying orders of High Court as per para. [39] of judgment)
Per Lim Chong Fong JCA delivering the judgment of the court:

(1) The award was not binding on the appellant because it had been made in an arbitration pursuant to an oppression petition between the shareholders of the appellant, *to wit*, the respondents and CPK and CKF only. The appellant was not a party to the arbitration and was thus not bound by it. The JC made a misdirection when interest was awarded against the appellant because interest was awarded in the award. Although the JC had the discretion to award pre-judgment interest, pursuant to s. 11 of the Civil Law Act 1956, the exercise of discretion could not be made in contravention of a clear contractual provision between the parties. (paras 23, 24 & 26)

(2) The letter must be read as a whole in its proper context. The statement 'The amount due to your clients based on 49% shares in the company totalled RM3,605,856.57' (which partly included the debt of the declared 2013 dividends amounting to RM983,415.30) in the third paragraph of the letter was a clear and unequivocal admission that the declared 2013 dividends were still due and payable. It did not accord with the first example provided in *Wee Tiang Teng v. Ong Chong Hooi & Anor* that the declared 2013 dividends debt subsisted then but not in 2017 when the acknowledgment was given. This was also corroborated by the fifth paragraph of the letter which stated that the whole of the RM3,605,856.57 was subject to lien and set off in defence of the acknowledged sum of RM3,605,856.57 for financial assistance given by the appellant to the respondents. If there was no debt subsisting, then the appellant would neither need to rely on a lien nor set off. (paras 35 & 36)

Case(s) referred to:

Ansett Australia Ltd (Subject To A Deed Of Company Arrangement) v. Travel Software Solutions Pty Ltd (No 2) [2007] VSC 401 ***(refd)***

CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals [2014] 3 CLJ 1 FC ***(refd)***

Good v. Parry [1963] 2 All ER 59 ***(refd)***

Great Partners Industries Ltd & Ors v. Kee Hin Ventures Sdn Bhd [2022] CLJU 2458; [2022] 1 LNS 2458 HC ***(refd)***

Lim Eng Kay v. Jaafar Mohamed Said [1982] CLJ 298; [1982] CLJ (Rep) 190 FC ***(refd)***

Lim Kar Bee v. Abdul Latif Ismail [1977] CLJU 64; [1977] 1 LNS 64 FC ***(refd)***

P'ng Hun Sun v. Dato' Yip Yee Foo [2013] CLJU 320; [2013] 1 LNS 320 CA ***(refd)***

Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd [2012] CLJU 1416; [2012] 1 LNS 1416 CA ***(refd)***

Protasco Bhd v. Tey Por Yee & Another Appeal [2018] 5 CLJ 299 CA ***(refd)***

Re Compania De Electricidad De La Provincia De Buenos Aires Ltd [1978] 2 All ER 668 ***(refd)***

Re Severn v. Wye & Anor [1986] 1 Ch 559 ***(refd)***

Ritz Garden Hotel (Cameron Highlands) Sdn Bhd v. Balakrishnan Kaliannan [2013] 7 CLJ 413 FC ***(refd)***

Seow Hoon Hin v. Hartalega Holdings Bhd & Ors [2019] CLJU 779; [2019] 1 LNS 779 CA ***(refd)***

TA Securities Holdings Bhd v. Dato' Zhang Li [2022] CLJU 1878; [2022] 1 LNS 1878 HC ***(refd)***

The Hongkong & Shanghai Banking Corporation v. The Administrator In Hong Kong Of Catholic Missions Of Macau [1978] HKCU 48 ***(refd)***

Tomolugen Holdings Ltd v. Silica Investors Ltd And Other Appeals [2016] 1 SLR 373 ***(refd)***

Toronto Railway Co v. Corp Of The City Of Toronto [1906] AC 117 ***(refd)***

Wee Tiang Teng v. Ong Chong Hooi & Anor [1978] CLJU 234; [1978] 1 LNS 234 FC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 11
Companies Act 1965 (repealed), s. 181
Limitation Act 1953, ss. 6, 26(2)

For the appellant - Yeoh Cho Kheong & Saw Wei Siang; M/s Ranjit Singh & Yeoh
For the respondents - Joseph Yeo, Kelvin Ng Sin Huat & Lim Yin Shan; M/s HK Ang & Partners

[Editor's note: For the High Court judgment, please see Great Partners Industries Ltd & Ors v. Kee Hin Ventures Sdn Bhd [2022] CLJU 2458; [2022] 1 LNS 2458 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Lim Chong Fong JCA:

Introduction

[1] This is an appeal in respect of a claim for dividends in a company by shareholders.

[2] The appellant, which is the defendant in the Kuala Lumpur High Court Suit No. WA-22NCC-630-11/2019 ("suit"), is a private limited investment holding company.

[3] The respondents, who are the plaintiffs in the suit, are the minority shareholders of the appellant.

[4] The majority shareholders and directors of the appellant are Cheng Ping Keat ("CPK") and Cheng King Fa ("CKF").

[5] The sole asset of the appellant is the shares in a public listed company known as Khind Holdings Sdn Bhd ("KHSB").

Background

[6] There were disputes between the respondents and the majority shareholders of the appellant in 2008 in relation to the payment of dividends by the appellant.

[7] As the result, the respondents commenced an oppression petition against the majority shareholders and others under s. 181 of the Companies Act 1965.

[8] However, the petition was stayed and the disputes were referred instead to arbitration pursuant to an arbitration clause in the shareholders agreement.

[9] The arbitral tribunal *via* its award dated 11 October 2016 ("award") dismissed the majority shareholder's claim but allowed the respondents' counterclaim for outstanding dividends owed.

[10] Subsequently, the respondents on 25 April 2018 *via* Kuala Lumpur High Court Originating Summons No. WA-24NCC(Arb)-50-11/2017 ordered the award to be enforced as a judgment of the court.

[11] The majority shareholders thereafter applied to the High Court to set aside the aforesaid enforcement order but their application was dismissed on 16 July 2018.

[12] Consequently, the respondents on 8 November 2019 commenced the suit against the appellant for recovery of dividends declared by the appellant for the years 2013 to 2016 amounting to RM3,605,857.57 ("first head of claim") as well as dividends undeclared by the appellant for the years 2008 to 2012 and 2017 amounting to RM5,490,238.53 notwithstanding those dividends were declared and received by the appellant from KHSB ("second head of claim").

In The High Court

[13] After trial, the learned Judicial Commissioner allowed the respondents' first head of claim but dismissed the respondents' second head of claim.

[14] The learned High Court Judicial Commissioner on 11 June 2022 held as follows on the respondents' first head of claim in the grounds of judgment as reported in *Great Partners Industries Ltd & Ors v. Kee Hin Ventures Sdn Bhd* [2022] CLJU 2458; [2022] 1 LNS 2458 ("grounds of judgment"):

> Finding on Issue 1: The Plaintiffs Are Entitled to the 2013 to 2016 Dividends
>
> [22] It is not in dispute that the award provides that the plaintiffs are to be paid their dividends, and that the award has been enforced at the High Court, by way of the Enforcement Order.
>
> [23] It is also not in dispute that the total dividends declared by the defendant for 2013 to 2016 are RM7,358,891. This is set out in the financial statements of the defendant for 2013 to 2016.
>
> [24] The plaintiffs collectively hold 49% of the shares of the defendant, and 49% of the declared dividends totalling RM7,358,891 would amount to RM3,605,856.57.
>
> [25] This amount of RM3,605,856.57 being the plaintiffs' entitlement to dividends between 2013 to 2016 has been verified and confirmed by the following:
>
> (a) The statement of CPK, a shareholder and director of the defendant, during cross-examination. CPK admitted to the amount of dividends of RM3,605,856.57 owing to the plaintiffs as reflected in the accounts of the defendant. His only qualifications were that the defendant has a lien on the amount and that the claim for the dividends due is time-barred.

(b) A letter dated 31 March 2017 ("March 2017 Letter"), issued by the defendant's solicitors to the plaintiffs' solicitors. The letter confirmed the total declared dividends of the defendant between 2013 to 2016, and stated that: "The amount due to your clients based on 49% shares in the Company totals RM3,605,856.57."

(c) The defendant's financial statements for 2017, 2018 and 2019, which acknowledged the total dividends payable of RM3,606,000, covering the plaintiffs' dividends for 2013 to 2016.

[26] The plaintiffs' rights to the dividends declared by the defendant for the years 2013 to 2016 are set out in Article 102 of the defendant's memorandum and articles of association. Article 102 provides that:

> *Subject to the rights of persons, if any, entitled to shares with special rights as to dividends shall be declared and paid according to the amounts paid or credited as paid on the shares in respect whereof the dividend is paid*, but no amount paid or credited as paid on a share in advance of calls shall be treated for the purposes of this regulation as paid on the shares. All dividends shall be apportioned and paid proportionately to the amounts paid or credited as paid on the shares during any portion or portions of the period in respect of which the dividend is paid; but if any share is issued on terms providing that is shall rank for dividends as from a particular date that share shall rank for dividend accordingly.

[27] Article 102 sets out that a shareholder has the right to dividends. As such, the defendant's act in paying CPK and CKF to the exclusion of the plaintiffs is an infringement of the plaintiffs' rights as shareholders, and specifically their rights under Article 102.

[28] The defendant however contended that pursuant to Article 9 of the defendant's memorandum and articles of association, the defendant has a lien over the dividends due to the plaintiffs. Article 9 provides that the defendant shall have a lien over all shares (which extends to dividends declared), for a member's debts, liabilities and engagements.

[29] It is the defendant's case that the plaintiffs are indebted to the defendant in the sum of RM5,000,000, arising from the Financial Assistance. The defendant filed Suit 198 to claim this sum against the plaintiffs.

[30] In the course of the proceedings before this court, the stand taken by the defendant pending the decision in Suit 198 was that its defence in relation to the existence of the lien will fail, in the event Suit 198 is dismissed. Following the dismissal of Suit 198 on 22 September 2021, and the stance taken by the defendant in relation to the dismissal of the action, the defence of the existence of a lien can no longer stand.

[31] As such, the defendant is entitled to the dividends declared between 2013 to 2016, amounting to RM3,605,856.57.

[32] The plaintiffs also claimed 8% interest per annum on the amount of RM3,605,856.57, from the date of the award to the date of judgment. This was objected to by the defendant. The court was referred to Article 100 of the defendant's memorandum and articles of association which states:

> No dividend shall be paid otherwise than profit or shall bear interest against the Company.

[33] The defendant argued that the plaintiffs' claim to the declared dividends is essentially a contractual claim, and the court should uphold the contractual term in Article 100, and not allow interest on the outstanding dividends.

[34] However, I am of the view that the defendant had failed to appreciate that the plaintiffs' claim is not purely contractual, but is also based on the award, which ordered the payment of the dividends.

[35] On this basis, I allowed the imposition of interest of 8% per annum on the outstanding dividends from the date of the award until the date of this judgment. For any outstanding dividends declared after the date of the award, I allowed interest of 8% per annum on the outstanding dividends from the date of the declaration of the dividend until the date of this judgment.

Finding On Issue 2: The Claim For The 2013 Dividend Is Not Time-Barred

[36] The defendant contended that the Claim for the 2013 Dividend is time-barred under section 6 of The Limitation Act 1953.

[37] Section 6 of the Limitation Act 1953 provides that:

> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
>
> (a) actions founded on a contract or on tort ...

[38] The defendant's case is that an interim dividend was declared on 3 October 2013, and was paid out on 4 October 2013. As such, the cause of action for the Claim for the 2013 Dividend had accrued on 4 October 2013, and expired on 3 October 2019. This action was filed on 7 November 2019.

[39] Notwithstanding the above, I have taken note of the existence of an acknowledgement of the dividends due (which would include the Claim for the 2013 Dividend) as a debt owing by the defendant to the plaintiffs. This is set out in the March 2017 Letter (see paragraph 28(b) above).

[40] This acknowledgment attracts the application of section 26(2) of the Limitation Act 1953 which stipulates that a cause of action is deemed to have accrued on the date of an acknowledgement of debt.

[41] I am guided by *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207, where the Federal Court held as follows, on the issue of an acknowledgment of a debt:

> [30] To put it in its proper context, the aforesaid letter was the response of the respondent to the demands by the appellant for payment of RM581,876.77. *Evidently, in the aforesaid letter, the respondent did not deny liability*. Also, the respondent did not deny

> that a "gigantic expense ... of RM581,876.77" was incurred. But rather, *from the totality of the tone and language used, there was a clear and unequivocal acknowledgement by the respondent that there was a subsisting debt of RM581,876.77*, the acknowledgement of which was further borne out by the plea of the respondent to the appellant to waive the shortfall. We could accept that the plea of indigence would have been made in good faith. *But unfortunately for the respondent, because of the acknowledgement, the right of action of the appellant for the shortfall for the period prior to 26 October 1999, was thereby deemed to have accrued on 15 September 2003*. When action was filed in 2005, limitation had not set in.

[42] Similarly, in this case, the acknowledgement in the March 2017 Letter is clear and equivocal, with the defendant confirming the specific amount due to the plaintiffs.

[43] The defendant cited the case of *Kwong Yik Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2011] 2 CLJ 269, where the Court of Appeal held that the letter relied on was not an acknowledgment of a debt. In that case, the letter merely made reference to the release of financing facilities, subject to certain conditions being complied with. There was no clear acknowledgement of a debt.

[44] In contrast, in the present case before this court, I find the following statement in the March 2017 Letter to be a clear and unequivocal acknowledgement of a debt:

> The amount due to your clients based on 49% shares in the Company totals RM3,605,856.57.

[45] I am of the view that the sentence cannot be read in any other manner than as an acknowledgement by the defendant that the amount of RM3,605,856.57 is owed to the plaintiffs.

[46] I disagree with the defendant that the reference to a lien on the dividends in the subsequent paragraph of the March 2017 Letter, is a condition imposed on the acknowledgment of the debt. The reference raises a defence in relation to the defendant's right to exercise the lien over the dividend. However, it did not in my view extinguish or modify the acknowledgment of the debt, made by the defendant.

[47] With the acknowledgment in the March 2017 Letter, I am therefore of the view that the Claim for the 2013 Dividend is not time-barred.

G. Decision

[54] With the considerations and findings set out above, the decisions of the court are as follows:

> (a) The first head of claim, which is the plaintiff's claim for an apportionment of dividends declared by the defendant for 2013 to 2016 is allowed.
>
> (emphasis added)

[15] The appellant is dissatisfied with the learned Judicial Commissioner's decision on the first head of claim and has, on 11 August 2022, lodged its appeal to the Court of Appeal.

Findings Of This Court

[16] Before us, the appellant has confined its submissions on two issues related to the first head of claim submitted in the High Court and dealt with by the learned Judicial Commissioner as issue 1 and issue 2, *viz*:

(i) whether the appellant is bound by the effect of the award in respect of interest awarded; and

(ii) whether limitation has set in *vis-à-vis* the appellant's letter dated 31 March 2017.

[17] According to the appellant, issue 1 must be answered in the negative and issue 2 must be answered in the affirmative, respectively. As the result, the learned Judicial Commissioner was in error and the appeal must hence be allowed.

[18] The appellant further pointed out that both issue 1 and issue 2 are pure questions of law; thus, the appropriate standard of review is that of a fresh re-consideration following *P'ng Hun Sun v. Dato' Yip Yee Foo* [2013] CLJU 320; [2013] 1 LNS 320; [2013] 6 MLJ 523, where Zawawi Salleh JCA (later FCJ) stated as follows:

> [13] Application of the correct standard review has not been proved exceedingly difficult in cases involving purely factual or purely legal questions. It is trite that the appropriate standard of review for purely legal questions is *de novo* review where the appellate court is not required to give deference to the rulings of the trial judge. Rather, it is free to perform its own analysis of the legal issue presented. When the finding of the trial judge is factual, however, the fact finder's decision cannot be disturbed on appeal unless the decision of the fact finder is plainly wrong (see *China Airlines Ltd v. Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) And Another Appeal* [1996] 3 CLJ 163; [1996] 2 MLJ 517); *Zaharah A Kadir v. Ramuna Bauxite Pte Ltd & Anor* [2011] 1 LNS 1015, *Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2013] 1 LNS 1; [2013] 2 MLJ 650) ...

[19] In opposition, the respondents' submission is that the answers on issue 1 and issue 2 are converse to that submitted by the appellant, respectively and, therefore, rightly decided by the learned Judicial Commissioner. The appeal must hence be dismissed.

[20] Since this is an appeal after trial, our appellate function here is purely that of review based on the appeal record subject generally to the principles in *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] CLJU 1416; [2012] 1 LNS 1416 and specifically the principles in *P'ng Hun Sun v. Dato' Yip Yee Foo* (*supra*) in light of the nature of the issues canvassed before us.

We acknowledge that both issues are questions of interpretation of statute and construction of the company constitution; hence, they are purely legal questions.

[21] In respect of issue 1, the appellant contended that the learned Judicial Commissioner wrongly ordered payment of interest on the dividends declared between 2013 to 2016 amounting to RM3,605,856.57 on the basis that interest was awarded in the award. Additionally, art. 100 of the articles of association of the appellant prescribes as follows:

> 100. No dividend shall be paid otherwise than profit or shall bear interest against the Company.

[22] The respondents replied that they are entitled to fully rely on the award to recover interest from the appellant following *Toronto Railway Co v. Corp Of The City of Toronto* [1906] AC 117, which held that payment of interest seems to be a fair and equitable compensation where payment of a just debt has been improperly withheld by the defaulter. The court has the broad and unencumbered discretionary power to do so following the cases of *Lim Eng Kay v. Jaafar Mohamed Said* [1982] CLJ 298; [1982] CLJ (Rep) 190; *Lim Kar Bee v. Abdul Latif Ismail* [1977] CLJU 64; [1977] 1 LNS 64; [1978] 1 MLJ 109 and *Ritz Garden Hotel (Cameron Highlands) Sdn Bhd v. Balakrishnan Kaliannan* [2013] 7 CLJ 413; [2013] 6 MLJ 149.

[23] It is plain to us that the award is not binding on the appellant company because the award has been made in an arbitration pursuant to an oppression petition between shareholders of the appellant company, *to wit* the respondents and CPK and CKF only. The appellant is not a party to the arbitration and is thus not bound by it following *Protasco Bhd v. Tey Por Yee & Another Appeal* [2018] 5 CLJ 299, where Nallini Pathmanathan JCA (now FCJ) held as follows with emphasis added by us:

> [66] *It is likely that the arbitrator will make findings of fact against the three main actors, as they will most likely be important witnesses in the course of the arbitration on behalf of PT ASU as well as Protasco.*
>
> [67] *It is open to Tey and Ooi to seek to challenge these findings made in the arbitration to which they were personally not a party and by which they would argue that they are not technically bound. If such a stance were adopted in the court proceedings, it is likely that it would be seen to be a re-litigation of matters already determined by the arbitral tribunal. Tey and Ooi might well argue that they were merely witnesses for the entities and were not accorded a full opportunity to defend themselves on a personal basis in respect of specific causes of action such as conspiracy to defraud.*
>
> [68] *The net result is that whatever the arbitrator's findings and final decision may be, such findings are not binding on Tey and Ooi in relation to the claims made against them in the court proceedings, unless they agree to be so bound.*
>
> (emphasis added)

It is also instructive to note that in the Singapore Court of Appeal case of *Tomolugen Holdings Ltd v. Silica Investors Ltd And Other Appeals* [2016] 1 SLR 373, Sundaresh Menon CJ held as follows:

> *An arbitrator whose power are derived from a private agreement between A and B plainly has no jurisdiction to bind anyone else by a decision on whether a patent is valid, for no one else has mandated him to make such a decision, and a decision which attempted to do so would be useless.*
>
> (emphasis added)

[24] Consequently, we find that the learned Judicial Commissioner made a misdirection when interest was awarded against the appellant because interest was awarded in the award, see paras. [34] and [35] of the grounds of judgment.

[25] That notwithstanding, we also find the learned Judicial Commissioner, based on the cases advanced by the respondents, awarded the interest claimed by the respondents by virtue of s. 11 of the Civil Law Act 1956, that provides:

> 11. Power of Courts to award interest on debts and damages
>
> (1) In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section:
>
> (a) shall authorise the giving of interest upon interest;
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.
>
> (2) Where interest is awarded under subsection (1) for recovery of damages under section 6A of the Limitation Act 1953, the interest may be given for the whole or any part of the period between the starting date and the date of the judgement.

[26] Hence and although the learned Judicial Commissioner has the discretion to award pre-judgment interest pursuant to s. 11 of the Civil Law Act 1956, we however find that the exercise of discretion cannot be made in contravention of a clear contractual provision between the parties as held in *TA Securities Holdings Bhd v. Dato' Zhang Li* [2022] CLJU 1878; [2022] 1 LNS 1878 and *CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals* [2014] 3 CLJ 1; [2014] 3 MLJ 169; see also the Hong Kong case of *The Hongkong & Shanghai Banking Corporation v. The Administrator In Hong Kong Of Catholic Missions Of Macau* [1978] HKCU 48. In this case, the learned Judicial Commissioner again made a misdirection by having ignored the

unequivocal provision in art. 100 of the articles of association which bind the respondents and the appellant. We are nonetheless mindful that in the Australian case of *Ansett Australia Ltd (Subject To A Deed Of Company Arrangement) v. Travel Software Solutions Pty Ltd (No 2)* [2007] VSC 401, the court made a distinction between a dividend and a dividend debt whilst interpreting a similar provision in the articles of association of the company concerned but we, with respect, find that distinction incongruent as well as overreaching.

[27] Appellate intervention is thus warranted here in respect of issue 1.

[28] As to issue 2, which concerns limitation, the appellant contended that the learned Judicial Commissioner failed to find that the respondents' claim for the 2013 dividends has been barred by limitation by virtue of s. 6 of the Limitation Act 1953 that provides:

> 6. Limitation of actions of contract and tort and certain other actions
>
> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
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> (a) actions founded on a contract or on tort;
>
> (b) actions to enforce a recognisance;
>
> (c) actions to enforce an award;
>
> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.
>
> (2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.
>
> (3) An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.
>
> (4) An action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of any written law shall not be brought after the expiration of one year from the date on which the cause of action accrued:
>
> Provided that for the purpose of this subsection the expression "penalty" shall not include a fine to which a person is liable on conviction for a criminal offence.
>
> (5) Nothing in this section shall apply to:
>
> (a) any cause of action within the Admiralty jurisdiction of the High Court which is enforceable *in rem* other than an action to recover the wages of seamen, or

A (b) any action to recover money secured by any mortgage of or charge on land or personal property.

(6) Subject to sections 22 and 32 of this Act the provisions of this section shall apply (if necessary by analogy) to all claims for specific performance of a contract or for an injunction or for other equitable relief whether the B same be founded upon any contract or tort or upon any trust or other ground in equity.

[29] According to the appellant, the last day for the respondents to initiate their claim in court for the dividends was on 3 October 2019 based on the date of declaration of dividends as evidenced in the appellant's audited C financial statements for the financial year 2023 but the respondents only brought their action on 8 November 2019.

[30] In *Re Severn v. Wye & Anor* [1896] 1 Ch 559, it was held that when a company declares a dividend on its shares, a debt immediately becomes payable to each shareholder in respect of his dividend for which he can sue D at law and the statute of limitations immediately begins to run. Hence, the respondents' claim for the 2013 dividends is time-barred; see *Seow Hoon Hin v. Hartalega Holdings Bhd & Ors* [2019] CLJU 779; [2019] 1 LNS 779; [2019] 5 MLJ 421.

[31] The respondents in rebuttal contended that limitation had not been set E in by reason that the appellant *via* its previous solicitors had, however, admitted and acknowledged the debt in respect of the dividends in the letter dated 31 March 2017 ("letter"). As the result, the limitation period has been postponed to 30 March 2023 by virtue of s. 26(2) of the Limitation Act 1953 that provides:

F 26. Fresh accrual of action on acknowledgement or part payment

(1) Where there has accrued any right of action to recover land or to enforce a mortgage or charge in respect of land or personal property, and:

(a) the person in possession of the land or personal property G acknowledges the title of the person to whom the right of action has accrued; or

(b) in the case of any such action by a mortgage or chargee the person in possession as aforesaid or the person liable for the debt secured by the mortgage or charge makes any payment in respect thereof, whether principal or interest, H

the right shall be deemed to have accrued on and not before the date of the acknowledgment or last payment.

(2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a I deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:

Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder of the rent or interest then due, but any payment of interest shall have effect, for the purposes of this subsection only, as if it were a payment in respect of the principal debt.

[32] The respondents relied on the English case of *Re Compania De Electricidad De La Provincia De Buenos Aires Ltd* [1978] 2 All ER 668 that an acknowledgment of debt does not necessarily require a promise to pay. Consequently, the respondents were well within time in claiming the 2013 dividends based on the letter.

[33] In the premises, it is vital to review the intent and purport of the letter, which is reproduced as follows:

KHOR CHAI KOAN
Advocate & Solicitor, Peguambela & Peguamcara
Suite 03-01A, Wisma Sri Weld, 3A, Pengkalan Weld, 10300 Penang
Tel: (04) 2612982
Fax: (04) 2633275
e-mail: khorak.pg@gmail.com

Your Ref: LT/1925/A/CF
Our Ref: C18502(D)/KCK/j
Date: 31st March 2017

Messrs. HK Ang & Partners
Advocates & Solicitors
Suite 18.01, 18th Floor, Plaza Permata
No. 6, Jalan Kampar,
50400 Kuala Lumpur.

Dear Sirs,

Re: In the Matter of Arbitration Between Cheng Ping Keat & Anor. v. Great Partners Industries Ltd & 2 Ors

1. We act for Kee Hin Ventures Sdn. Bhd. (hereinafter called the Company).

We refer to:-

(a) the Arbitration Award dated 11.10.2016;
(b) the Memorandum And Articles Of Association of Kee Hin Ventures Sdn. Bhd.; and
(c) the Companies Act 1965.

2. We are instructed to state as follows:-

Pursuant to the Arbitration Award, all the 4 share sale agreements and shareholders agreements had been held to be void and unenforceable.

Despite both parties refusal to addressed section 67 of the Companies Act 1965, the Award handed down by the Honourable Tribunal found the parties in breach of section 67 of the Companies Act 1965.

On hindsight, both parties should have settled the disputes before the arbitration and saved all the costs incurred for this Award.

3. Now, in accordance to the Award your clients are the registered shareholder of a total 3,450,581 shares of the company.

...2/-

A

KHOR CHAI KOAN
31st March, 2017

Page 2

Based on the audited accounts of the Company, the total declared dividends are as follows:-

B

a.	Year ended 2013	...	2,006,970-00
b.	Year ended 2014	...	2,006,970-00
c.	Year ended 2015	...	1,373,190-40
d.	Year ended 2016	...	1,971,760-56
			7,358,890-96

C

The amount due to your clients based on 49% shares in the Company totaled 3,605,856-57.

4. The Award specifically dismissed our client's claim of RM11,366,597.00 for specific performance and RM3,000,000.00 claim of restitution to the 1st Claimant. Your clients' claim for declaration of 9,815,061 shares of KHB was dismissed as well.

D

Pursuant to the Award, the parties had to comply with the Companies Act 1965. We would like to draw your attention to **Section 67(6) of the Companies Act, 1965**
"Nothing in this section shall operate to prevent the company or any person from recovering the amount of any loan made in contravention of this section or any amount for which it becomes liable, either on account of any financial assistance given, or under any guarantee entered into or in respect of any security provided, in contravention of this section."

E

5. We are of the opinion that pursuant to that subsection of aforesaid, the Company is entitled to recover all the losses from the financial assistance rendered to your clients. As admitted by your clients that they had paid only RM5.5 million therefore the amount of financial assistance recoverable is RM8 million.

We are pleased to draw to your attention to the following articles of the **Memorandum And Articles Of Association** of the Company:-

F

1. **Article 9: The Company shall have a first and paramount lien upon all shares (whether fully paid or not) registered in the name of any member, either alone or jointly with any other person, for his debts, liabilities and engagements whether the period for the payment, fulfillment or discharge, thereof shall have actually arrived or not, and such lien shall extend to all dividends from time to time declared in respect of such shares, but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this Article.**

G

2. **Article 100: No dividend shall be paid otherwise than out of profit or shall bear "interest" against the company.**

...3/-

H **[34]** In *Wee Tiang Teng v. Ong Chong Hooi & Anor* [1978] CLJU 234; [1978] 1 LNS 234; [1978] 2 MLJ 54, Suffian LP instructively held as follows in respect of the interpretation of s. 26 of the Limitation Act 1953:

> Davies LJ agreed with the trial Judge when he said that "the letter did not acknowledge the claim; it only acknowledged that there might be a claim".
>
> I
>
> With respect we are of the opinion that the letter in question before us was not a sufficient acknowledgment within our s. 26(2). By it the defendants acknowledged that a claim had been made against them, they

did not acknowledge that they were indebted to the plaintiff, and even if it was an acknowledgment the debt acknowledged was not quantified in figures, nor was it capable of ascertainment by counterclaim or by extrinsic evidence without further agreement of the parties. There are three kinds of acknowledgment:

(1) an acknowledgment by the debtor that a debt subsisted in the past but not at the time of the acknowledgment;

(2) an acknowledgment that it subsists at the time of the acknowledgment; and

(3) an acknowledgment that it may subsist in the future but not at the time of the acknowledgment.

In *Consolidated Agencies Ltd. v. Bertram Ltd.* [1965] AC 470 the Privy Council at page 482 approved the following statement of an author on the law of limitation:

> To take a demand out of the statute of limitation on the ground of an acknowledgment, the language of the debtor must amount to an unequivocal admission of a subsisting debt, that is subsisting at the time of the acknowledgment." that was a decision on the Indian Limitation Act, 1908, we would respectfully follow the principle therein stated, since the acknowledgments of kinds (1) and (3) are not really admissions that the debtor is indebted to the creditor.

[35] The learned Judicial Commissioner found in favour of the respondents in paras. [39] and [40] and particularly paras. [44] to [47] of the grounds of judgment. Upon our review of the letter, we find that the acknowledgment concerned is not akin to the first example provided in *Wee Tiang Teng v. Ong Chong Hooi & Anor* (*supra*), contrary to that submitted by the appellant. The letter must be read as a whole in its proper context. In our view, the statement "The amount due to your clients based on 49% shares in the company totalled RM3,605,856.57" (which partly included the debt of the declared 2013 dividends amounting to RM983,415.30) in the third paragraph therein is hence a clear and unequivocal admission that the declared 2013 dividends are still due and payable. Consequently, it does not accord with the aforesaid first example that the declared 2013 dividends debt subsisted then but not in 2017 when the acknowledgment was given.

[36] This is also, in our view, corroborated by the fifth paragraph of the letter, which stated that the whole of the RM3,605,856.57 is subject to lien and set off in defence of the acknowledged sum of RM3,605,856.57 for financial assistance given by the appellant to the respondents. If there is no debt subsisting, then the appellant would neither need to rely on a lien nor set off. We are guided and mindful from the English Court of Appeal case of *Good v. Parry* [1963] 2 All ER 59 that it is a good acknowledgment of debt for purposes of the Limitation Act even if the debtor says in the same writing that he will never pay it.

[37] Consequently, we find that there is no appealable error in respect of issue 2.

Conclusion

[38] In recapitulation, we answer issue 1 in the negative as well as issue 2 in the negative.

[39] For the foregoing reasons, we therefore unanimously allow the appeal in part by setting aside parts of the judgment of the High Court dated 16 March 2022 pertaining to the award of pre-judgment interest. Hence, the orders made are varied accordingly to as follows:

(i) the first plaintiff be paid a sum of RM2,391,639.56;

(ii) the second plaintiff be paid a sum of RM735,889.10;

(iii) the third plaintiff be paid a sum of RM478,327.91;

(iv) the plaintiffs' claim for an account for all dividend due from the defendant in respect of the profits and expenses of the defendant for the period of 2008 to 2012 and 2017 is hereby dismissed;

(v) the plaintiffs' claim for the defendant to declare and distribute dividends to the plaintiffs for the period 2008 to 2012 and year 2017 within 30 days from the date of the judgment is hereby dismissed;

(vi) interest at the rate of 5% be awarded by this Honourable Court calculated from the date of the judgment until full settlement thereof; and

(vii) costs of RM30,000 (Ringgit Malaysia: thirty thousand only), subject to allocatur payable by the defendant to the plaintiffs.

[40] All pre-judgment interest if already paid for dividends declared from 2013 to 2016 be accordingly refunded by the respondents to the appellant.

[41] Since the parties have won an issue each, there shall be no order as to costs of the appeal.